No. 10-1491

# In The Supreme Court of the United States

ESTHER KIOBEL, individually
and on behalf of her late husband,
DR. BARINEM KIOBEL, et al.,

*Petitioners,*

v.

ROYAL DUTCH PETROLEUM CO., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF *AMICI CURIAE* NUREMBERG SCHOLARS OMER BARTOV, MICHAEL J. BAZYLER, DONALD BLOXHAM, LAWRENCE DOUGLAS, HILARY EARL, HON. BRUCE J. EINHORN, RET., DAVID FRASER, SAM GARKAWE, STANLEY A. GOLDMAN, GREGORY S. GORDON, MICHAEL J. KELLY, MATTHEW LIPPMAN, MICHAEL MARRUS, AND FIONNUALA D. NÍ AOLÁIN, IN SUPPORT OF PETITIONERS


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## PARTIES TO THE PROCEEDING

Petitioners: Esther Kiobel, individually and on behalf of her late husband, Dr. Barinem Kiobel, Bishop Augustine Numene John-Miller, Charles Baridorn Wiwa, Israel Pyakene Nwidor, Kendricks Dorle Nwikpo, Anthony B. Kote-Witah, Victor B. Wifa, Dumle J. Kunenu, Benson Magnus Ikari, Legbara Tony Idigima, Pius Nwinee, Kpobari Tusima, individually and on behalf of his late father, Clement Tusima

Respondents: Royal Dutch Petroleum Co., Shell Transport and Trading Company PLC, Shell Petroleum Development Company of Nigeria, Ltd.

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## INTEREST OF *AMICI CURIAE*[1]

*Amici Curiae* – listed in the attached Appendix – comprise academicians from three disciplines: law, history, and political science, and have particular knowledge about Nuremberg-era jurisprudence and the international trials that took place in occupied Germany in the aftermath of the Second World War. *Amici* submit this brief in support of the petition for a grant of the writ of *certiorari* from the erroneous majority (2-1) decision in *Kiobel v. Royal Dutch Petroleum*.[2] This *amicus* brief seeks to emphasize the significance of the grave errors in the majority decision in *Kiobel* concerning the Nuremberg-era jurisprudence. Specifically, the majority opinion is both factually and legally incorrect in stating that the Nuremberg precedent stands for the proposition that corporations cannot be punished under international law.

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[1] This brief is submitted pursuant to Supreme Court Rule 37 in support of Petitioners. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011).

Given the singular importance of Nuremberg[3] and the *Kiobel* majority's reliance on it as precedent, it is particularly crucial that this Court understand how German corporations were punished under international law, alongside the punishment of individual Nazi war criminals, after Nazi Germany's defeat.

## SUMMARY OF ARGUMENT

The erroneous analysis of the *Kiobel* majority concludes that "[n]o corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights."[4] The majority decision in *Kiobel*, however, ignored the historical context, laws, and actions taken by the Allies against those accused of international law violations after the Second World War to conclude, erroneously, that international law that came out of the Nuremberg trials does not impose liability on corporations. In doing so, the majority ignored that the Allied Control Council – the international body governing occupied Germany – deployed a range of remedial actions to hold both

[3] For example, when the International Law Section of the American Bar Association chose to commemorate the 60th anniversary of the Nuremberg trials it called its program "*Nuremberg and the Birth of International Law*." *Available at* http://www.abanet.org/intlaw/nuremberg05.doc.

[4] *Kiobel*, 621 F.3d at 148.

natural and juristic persons accountable for violations of international law. Such actions included the dissolution of corporations and the seizure of their assets Indeed, even before the first Nuremberg trial began, the Allied Control Council had already dissolved the German corporate cartel I.G. Farben[5] and seized its assets. As a result, when the international trial of individual Farben defendants took place pursuant to Control Council Law No. 10, there was no need to put I.G. Farben itself on trial, since it had already suffered corporate death pursuant to Control Council Law No. 9.

The entire point of the Nuremberg trials and those trials authorized by Control Council Law No. 10 was to put individuals in the dock, in Courtroom 600 of the Palace of Justice and other courtrooms throughout occupied Germany. It was to show that Nazi leaders and other perpetrators, including German industrialists, could be held criminally responsible under international law as individuals. Punishment of German corporations under international law took place outside of the courtroom.

The impression left by the majority opinion in *Kiobel* is an historically inaccurate conclusion that international law that came out of the jurisprudence of Nuremberg does not provide for sanctions on corporations. Rather, the international law made by

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[5] Interessengemeinschaft Farbenindustrie Aktiengesellschaft ("Syndicate of Dyestuff-Industry Corporations").

the Allies through the various measures they took, including holding trials of Nazi war criminals, unequivocally shows that corporations, as well as natural persons, are the subjects of international law and can be held accountable, in a variety of ways, for violations of international law. Further the *Kiobel* majority and the court below ignore the Nuremberg-era reliance on customary international law, which was not defined exclusively in terms of international criminal law.

## ARGUMENT

### I. THE MAJORITY IN *KIOBEL* MISINTERPRETED THE CONTEXT AND LEGACY OF THE NUREMBERG TRIALS

The first error committed by the majority in *Kiobel* in its analysis of the Nuremberg trials was its failure to recognize how those historic proceedings fit into the context of the entire program that the Allies – the United States, United Kingdom, and U.S.S.R., who were joined later by France – created for defeated Germany at the end of the Second World War. The program had three components: what to do with the German state upon defeat of the Third Reich, what to do with natural persons who committed crimes, and what to do with the German economy and its industrial cartels.

With regard to the defeated German Reich, the Allies first occupied the country by dividing it into

four zones and thereafter, as a consequence of the Cold War, into two states: the Federal Republic of Germany, created out of the Western zones, and the German Democratic Republic, created out of the Soviet zone.

With regard to natural persons, the outline of what to do with the Reich leaders and other perpetrators of "atrocities, massacres and executions" was first set out in the Moscow Declaration of November 1, 1943,[6] while the war was still ongoing, and then confirmed by the London Charter of August 8, 1945, after Nazi Germany's unconditional surrender.[7] The Moscow Declaration left open the decision of what to do with the Reich leaders (including Hitler) until the conclusion of hostilities and the London Charter codified the decision of the Allies to try the so-called

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[6] "At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in ... atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. ... German criminals whose offenses have no particular geographical localization ... will be punished by joint decision of the government of the Allies." Statement of Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, Moscow, November 1, 1943, 3 Bevans 816, 834 Dep't St. Bull. (Nov. 6, 1943).

[7] Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Charter"), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945).

major war criminals (now without Hitler, who committed suicide) before an international military tribunal constituted at Nuremberg.

Prior to the London Charter, there was no treaty by which individuals could be prosecuted for international crimes. The International Military Tribunal ("IMT") was created by the London Charter to try individuals and announced the international crimes for which these major war criminals would be prosecuted: crimes against peace, war crimes, crimes against humanity, and conspiracy.

No pre-war international treaty set out these crimes (save for war crimes) or made individuals responsible for committing them. As a result, the Allies turned to customary international law. They did so in order to avoid the problem of *nulla crimen sine lege* (no crime without a law), thereby answering the accusation that the defendants in the dock at Nuremberg were being tried *ex post facto*. As Justice Robert Jackson, the chief Nuremberg prosecutor wrote in his Final Report to President Truman:

> We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do

> violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.[8]

The Allied Control Council charged with implementing the agreement made in the London Charter furthered the work of the IMT by enacting Control Council Law No. 10 on December 20, 1945.[9] Under Control Council Law No. 10, each of the Allies could conduct their own international law trials in zones they occupied by following the explicit international law now set out in the London Charter.

By failing to consider the IMT and post-IMT trials in the context of pre-Nuremberg customary international law, the majority in *Kiobel* made its

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[8] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945, at 342 (U.S. Dep't of State, Pub. No. 3080, 1949), *available at* http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/final-report-to-the-president.pdf. *See also Nuremburg Judgment*, 6 F.R.D. 69, 108-10 (1947) (longstanding recognition that international law imposes duties and liabilities upon individuals as well as upon states).

[9] Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 306, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

second error. The entire point of the IMT and the subsequent Nuremberg Military Trials ("NMT") held by the Americans pursuant to Control Council Law No. 10 was to put persons on trial for crimes committed on behalf of a sovereign state, the German Reich.[10] The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons can be made responsible for state crimes under international law. This emphasis on individual as opposed to state liability contrasted with the prior view of responsibilities under international law that only states were responsible, as reflected in the Versailles Treaty that followed the First World War.

The *Kiobel* majority's assertion that *only* individual human persons were prosecuted and faced punishment by the IMT also is incorrect. The London Charter specifically enunciated that groups or organizations could violate international law when it authorized the IMT to designate any group or organization as criminal: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or

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[10] On the terminology itself, the majority also erred, thus compounding its error that Nuremberg only intended to find human beings responsible for violations of international law. Control Council Law No. 10, upon which the majority relies heavily, discusses "persons" rather than "individuals."

organization of which the individual was a member was a criminal organization."[11]

The IMT prosecutors, in addition to the 23 individuals in the dock, also indicted six Nazi organizations: the Reich Cabinet, the *Sturmabteilung* ("SA"), the German High Command, the Leadership Corps of the Nazi Party, the *Schutzstaffel* ("SS") with the *Sicherheitsdienst* ("SD") as its integral part, and the SS. The Nuremberg judges acquitted the first three organizations and designated the last three as criminal.

The Nuremberg jurisprudence establishes, therefore, that not only states and natural persons can be liable for international law violations, but also juridical entities. The *Kiobel* majority opinion's statement, therefore, that "[i]t is notable, then, that the London Charter . . . granted the Tribunal jurisdiction over *natural persons only*"[12] is simply incorrect. That the majority judges would make such a statement is puzzling, to say the least.

The *Kiobel* panel's majority judges appear to recognize the problem with this assertion because in the next paragraph the opinion states that organizations were indeed indicted before the IMT and declared to be criminal organizations.[13] To deal with this problem in its argument the majority judges then

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[11] London Charter, Article 9.

[12] *Kiobel*, 621 F.3d at 133.

[13] *Id.* at 134.

state: "Such a declaration [by the IMT judges of the criminality of an indicted organization], however, did not result in the organization being punished or having liability assessed against it. Rather, the effect of declaring an organization criminal was merely to facilitate the prosecution of *individuals* who were members of the organization."[14]

This statement is correct on its face, but incomplete. It appears that the *Kiobel* majority judges, in making this statement, were unaware that by the time these organizations were declared to be criminal by the IMT, they were already punished *under international law* because the Allies had already imposed upon them through international law the most severe punishment of all: juridical death through dissolution as well as the confiscation of all their assets.

What is critical is that the Allies carried out this punishment under international law. It was an international treaty that dissolved the Nazi Party and its related entities on September 20, 1945 (following the London Charter on August 8, 1945 and before the IMT trial began on November 20, 1945).[15] This death

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[14] *Id.*

[15] *Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany*, Art. 38, *reprinted in* Supplement: Official Documents, 40 Am. J. Int'l L. 1, 29 (1946) ("The National Socialist German Workers' Party (NSDAP) is completely and finally abolished and declared to be illegal.").

by dissolution was confirmed by Control Council Law No. 2,[16] which abolished the Nazi Party and affiliated organizations permanently, declared them illegal, and authorized the confiscation of all their property and assets.

To state, therefore, that the IMT judgment declaring the organization criminal "did not result in the organization being punished or having liability assessed against it"[17] makes little sense, since these very same organizations were *already* punished and liability assessed against them through earlier international accords promulgated by the Allies and their occupation authorities.

## II. NUREMBERG-ERA JURISPRUDENCE SPECIFICALLY IMPOSED SANCTIONS ON CORPORATIONS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

The third issue that faced the Allies upon Nazi Germany's defeat was what to do with the German economy and the major industrial cartels that made the war possible. The *Kiobel* majority compounds its error of an ahistorical analysis of the Nuremberg

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[16] Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 131, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

[17] *Kiobel*, 621 F.3d at 134.

precedent by ignoring this issue. In doing so, it fails to account for other steps taken by the Allies *under international law* to address the culpability of corporations and other juristic persons. The international criminal trials of Nazi officials and individual industrialists were only one part of Allied efforts to punish those responsible for Nazi-era atrocities.

The earliest pronouncement of the Allies at Potsdam and Yalta created a framework for action against corporations complicit in the Nazi-era war crimes. The Yalta and Potsdam Agreements envisioned dismantling Germany's industrial assets, public and private, and creating a system of reparations for states and individuals injured during the Nazi period. Control Council Law No. 10, putting individuals on trial – whether German doctors, jurists, industrialists, or various members of the SS – was only a small part of the Allied plan for post-war Germany that also included the dissolution of private corporations, the seizure of industrial facilities, restitution of confiscated properties, and reparations to both the states and natural persons who had suffered harm.[18]

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[18] *See* Report Signed at Crimea (Yalta) Conference, Feb. 11, 1945, U.S.-U.K.-U.S.S.R., 59 Stat. 1823, 3 Bevans 1005 ("Yalta Agreement") and Berlin (Potsdam) Conference, Protocol of Proceedings, Feb. 11, 1945, 3 Dep't of State, Treaties and Other International Agreements of the United States of America 1776-1949 ("Potsdam Agreement").

Before issuing Control Council Law No. 10 on December 20, 1945, the same international occupation authority issued Control Council Law No. 9 on November 30, 1945.[19] This law specifically directed the dissolution of I.G. Farben and the dispersal of its assets.[20]

The basis of Control Council Law No. 9 was the customary international law prohibition of crimes against peace that the Allies cited in the London Charter and used to prosecute Nazi leaders for waging aggressive war. The Preamble to Control Council Law No. 9, titled "*Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof*," stated its clear purpose before ordering the dissolution of what was regarded as the Allies' principal economic enemy: the I.G. Farben industrial cartel.

> In order to insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that

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[19] Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

[20] A subsequent directive, Allied High Commission Law No. 35, *Dispersal of Assets of I.G. Farbenindustrie* of August 17, 1950, provided further details about how the decartelization of Farben would take place. *Reprinted in* Documents on Germany under Occupation, 1945-1954 at 503 (Oxford University Press 1955).

> I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential. . . .[21]

The punishment imposed by the Allied Control Council upon I.G. Farben was seizure. Article I of Control Council Law No. 9 states:

> All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized and the legal title thereto is vested in the Control Council.[22]

This ultimate sanction was as drastic as any that could be imposed on a juristic entity: death through seizure and was as much a pronouncement of international law as Control Council Law No. 10, which was used to prosecute individuals. The extreme sanction of dissolution imposed by Control Council No. 9 is clearly inconsistent with the majority opinion's conclusion that international law at the time of Nuremberg did not consider corporations liable for violations of international law norms.

It is unclear why the *Kiobel* majority ignored Control Council Law No. 9 and instead pointed solely to the fact that I.G. Farben itself was not criminally indicted alongside the individual industrialists tried pursuant to Control Council Law No. 10:

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[21] Control Council Law No. 9, Preamble.

[22] *Id.* art. I.

> In declining to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, while prosecuting the men who led I.G. Farben, the military tribunals established under Control Council Law No. 10 expressly defined liability under the law of nations as liability that could not be divorced from *individual* moral responsibility. It is thus clear that, at the time of the Nuremberg trials, corporate liability was not recognized as a "specific, universal, and obligatory" norm of customary international law.[23]

It is clear, however, that criminally prosecuting I.G. Farben alongside the industrialists would have been pointless since it had already been punished under international law in Control Council Law No. 9. As the Nuremberg judges who convicted the individual I.G. Farben defendants stated, "It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in the proceedings."[24] Taking both Control Council Laws Nos. 9 and 10 together, there is nothing in the historical record to

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[23] *Kiobel*, 621 F.3d at 135-36.

[24] *United States v. Krauch (The I.G. Farben Case)*, VIII Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1081, 1153 (1948), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf.

indicate that the Allies believed that corporations could not be punished under international law.[25]

Farben was not the only corporation subject to the ultimate sanction of dissolution. For example, the Control Council dissolved and liquidated a number of insurance companies under Control Council Law No. 57.[26] The Control Council also issued orders to carry out its mandate to seize the assets of other German

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[25] In addition, as Judge Leval notes in his concurring opinion, "[t]he [Nuremberg] tribunal's judgment makes clear that the Farben company itself committed violations of international law." *Kiobel*, 621 F.3d at 180 (Leval, J., concurring). Judge Leval then quotes the tribunal, which described the applicable law:

> Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified . . ., is in violation of international law. . . . Similarly *where a private individual or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law].

*Id.* (Leval, J., concurring) (emphasis in Judge Leval's opinion) (quoting *The I.G. Farben Case* at 1132-33).

[26] Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front* (Aug. 30, 1947), *reprinted in* 8 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

corporations, both to dissolve and liquidate them, and make them available for reparations.[27] Allied High Commission Law No. 27 provided for the reorganization of German coal, iron, and steel industries.[28]

In the U.S. Zone, the Potsdam Agreement was put into effect through Military Government Law No. 56 (Prohibition of Excessive Concentration of German Economic Power).[29] That ordinance also invoked international law, stating that it was

> Enacted in accordance with Paragraph 12 of the Potsdam Agreement in order (i) to prevent Germany from endangering the safety of her neighbors or again constituting a threat to international peace; (ii) to destroy Germany's economic potential to wage war. . . .

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[27] *See* Control Council Directive No. 39, *Liquidation of German War and Industrial Potential*, (Oct. 2, 1946), *reprinted in* 5 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf, and Control Council Directive No. 47, *Liquidation of German War Research Establishments* (Mar. 27, 1947), *reprinted in* 6 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

[28] Allied High Commission Law No. 27, *On the Reorganisation of the German Coal and Steel Industries* (16 May 1950), Official Gazette of the Allied High Commission for Germany No. 20 299 (May 20, 1950).

[29] Military Government Law No. 56, *Prohibition of Excessive Concentration of German Economic Power*, Military Government Gazette, U.S. Zone Issue C (Feb. 12, 1947).

> To this end it is desirable that . . . concentrations of economic power as exemplified, in particular, by cartels, syndicates, trusts, combines, and other types of monopolistic or restrictive arrangements which could be used by Germany as instruments of political or economic aggression, be eliminated at the earliest practicable date. . . .[30]

In yet another example, Alfried Krupp, the sole owner of Krupp, was sentenced to 12 years imprisonment and ordered to forfeit all his property under Control Council Law No. 10[31] and the entire Krupp concern was confiscated pursuant to Military Government Law No. 52,[32] and General Order No. 3.[33] Also pursuant to Military Government Law No. 52, General Order No. 7 declared that all iron and steel undertakings were "subject to seizure of possession or title, direction, management, supervision or

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[30] *Id.* Identical language was repeated in British Military Government Ordinance No. 78, 16 Military Government Gazette 412 (Feb. 12, 1947).

[31] *United States v. Krupp (The Krupp Case)*, 9 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1449, 1449-50 (1950).

[32] Military Government Law No. 52, Military Government-Germany, United States Zone, *Blocking and Control of Property* (May 8, 1945), amended version *reprinted in* U.S. Military Government Gazette, Germany, Issue A, at 24 (June 1, 1946).

[33] Allied Military Government, U.S. Zone, *General Order No. 3 (Pursuant to Military Government Law No. 52): Firma Friedrich Krupp* [General Order No. 3], Military Government Gazette (June 6, 1946).

otherwise being taken into control by Military Government."[34]

Given the penalties imposed on these corporations, the distinction in the treatment of the natural persons under Control Council Law No. 10 and the treatment of corporations under Control Council Law No. 9 and the other laws and directives does not indicate, as the *Kiobel* majority concludes, "the principle of individual liability for violations of international law has been limited to natural persons – not 'juridical' persons such as corporations. . . ."[35] The absence of criminal penalties imposed by the tribunal is more appropriately understood as a choice to sanction corporations through other international law mechanisms.

The conclusion of the *Kiobel* majority that the Nuremberg-era jurisprudence did not provide any liability for corporations for violations of customary international law is contrary to the historical record. From the imposition of the ultimate sanction of dissolution to the seizure of assets for reparations, it was understood that corporations could be made to "pay" for their complicity. Subjecting corporations to tort

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[34] Allied Military Government, British Zone, *General Order No. 7 (Pursuant to Military Government Law No. 52): Iron and Steel Undertakings*, Military Government Gazette (Aug. 20, 1946).

[35] *Kiobel*, 621 F.3d at 119.

liability for violations of international customary law is consistent with that understanding.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the *Kiobel* majority gravely erred in concluding that Nuremberg-era international jurisprudence did not recognize the liability of corporations for violations of international law. Since the Nuremberg precedent is so important to international law, *Amici* Nuremberg Scholars request that the Court grant the petition for *certiorari* to review the *Kiobel* majority's decision.

July 13, 2011

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## APPENDIX

### LIST OF *AMICI CURIAE*[1]

**Omer Bartov**

Professor Bartov is the Chair of the Department of History, John P. Birkelund Distinguished Professor of European History, and Professor of History and Professor of German Studies at Brown University and is the author of seven books and the editor of three volumes on the Holocaust; his work has been translated into several languages. Born in Israel and educated at Tel Aviv University and St. Antony's College, Oxford, Omer Bartov began his scholarly work with research on the Nazi indoctrination of the German Wehrmacht under the Third Reich and the crimes it committed during the war in the Soviet Union. This was the main concern of his books, *The Eastern Front, 1941-1945* (St. Antony's College Series, 2001) and *Hitler's Army: Soldiers, Nazis and War in the Third Reich* (Oxford University Press, 1991). He has also studied the links between World War I and the genocidal policies of World War II, as well as the complex relationship between violence, representation, and identity in the twentieth century. His books *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation* (Oxford University Press, 1996); *Mirrors of Destruction: War, Genocide and Modern Identity* (Oxford University Press, 2000); and *Germany's War and the Holocaust* (Cornell University

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[1] Affiliations are provided for identification purposes only.

Press, 2003) have all been preoccupied with various aspects of these questions.

**Michael J. Bazyler**

Professor Bazyler is Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law. He is also a research fellow at the Holocaust Education Trust in London and the holder of previous fellowships at the United States Holocaust Memorial Museum and Yad Vashem in Jerusalem (The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel), where he was the holder of the *Baron Friedrich Carl von Oppenheim Chair for the Study of Racism, Antisemitism and the Holocaust*. He is the author of numerous books, book chapters, and articles on the relationship of law and the Holocaust, including *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press, 2003) and the forthcoming *Forgotten Trials of the Holocaust* (University of Wisconsin Press).

**Donald Bloxham**

Professor Bloxham is Professor of Modern History at the School of History, Classics and Archaeology at the University of Edinburgh. He is the author of *The Final Solution: A Genocide* (Oxford University Press, 2009); *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford University Press, 2005); *Genocide*

*on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, 2001); and co-author, with Tony Kushner, of *The Holocaust: Critical Historical Approaches* (Manchester University Press, 2005). With Ben Flanagan, he is the editor of *Remembering Belsen: Eyewitnesses Recall the Liberation* (Vallentine, Mitchell and Co., 2005). With Mark Levene, he is a series editor of the ten-volume Oxford University Press monograph series entitled *Zones of Violence*, and is an editor, with A. Dirk Moses, of *The Oxford Handbook of Genocide Studies* (Oxford University Press, 2010). Formerly an editor of the *Journal of Holocaust Education*, the Vallentine Mitchell and Co. *Library of Holocaust Testimonies* and the *Holocaust Educational Trust Research Papers*, he is also on the editorial board of four journals – *Holocaust Studies*, *Patterns of Prejudice*, *Zeitschrift für Genozidforschung*, and the *Journal of Genocide Research*. He also serves on the board of foreign correspondents of the journal *900. Per una storia del tempo presente*.

**Lawrence Douglas**

Professor Douglas is the James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College. He holds degrees from Brown (A.B.), Columbia (M.A.), and Yale Law School (J.D.); and has received major fellowships from the Institute for International Education (ITT – Fulbright) and the National Endowment for the Humanities. He is the author of three books: *The Memory of Judgment:*

*Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), a widely acclaimed study of war crimes trials; *Sense and Nonsensibility* (Simon and Schuster, 2004), a parodic look at contemporary culture co-authored with Amherst colleague Alexander George; and *The Catastrophist* (Other Press, 2006; Harcourt, 2007), a novel. In addition, he has co-edited ten books on current legal topics. His writings have appeared in numerous journals and magazines including *The Yale Law Journal*, *Representations*, *The New Yorker*, *The New York Times Book Review*, *The Washington Post*, and *The Times Literary Supplement*. He is currently at work on a book about the cultural afterlife of war crimes trials to be published by Princeton University Press.

**Hilary Earl**

Professor Earl is Associate Professor in the Department of History at Nipissing University in North Bay, Ontario, Canada. She received her Ph.D. in 2002 from University of Toronto in European History, her M.A. in 1992 from University of New Brunswick in European History, and her B.A. in 1989 from University of New Brunswick in History. Dr. Earl's book, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History*, was published in June 2009 with Cambridge University Press. In 2009, she won a Research Achievement award at Nipissing University and won the University's Chancellor's Award for Excellence in Teaching. Additional awards

and fellowships include 2005-2006 Nipissing University Internal Research Grant; 2003 Fellowship Research Seminar: Interpreting Testimony, Center for Advanced Holocaust Studies, United States Holocaust Memorial Museum, Washington, D.C. (co-investigator); 2001-2002 Center for Advanced Holocaust Studies Research Fellowship, United States Holocaust Memorial Museum, Washington, D.C.; 1994-2000 University of Toronto Open Fellowship; 1997-1998 Leonard and Kathleen O'Brien Humanitarian Trust Fellowship; 1997-1998 Joint Initiative for German/European Studies Dissertation Award; and 1994-1998 New Brunswick Women's Doctoral Fellowship.

**Hon. Bruce J. Einhorn, Ret.**

The Honorable Bruce Einhorn is Adjunct Professor of Law and Director of the Asylum Clinic at Pepperdine University School of Law. He served as a federal immigration judge for seventeen years before retiring in 2007. Prior to his service on the court, he served as a special prosecutor and as Chief of Litigation for the U.S. Department of Justice's Office of Special Investigations. He regularly teaches a course on International Criminal Law.

**David Fraser**

Professor Fraser is Professor of Law and Social Theory at the University of Nottingham. His primary research focus is on legal systems under National

Socialism and law and the Holocaust generally. In 2003, he was a Charles H. Revson Foundation Fellow at the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum in Washington, D.C. He is the author of *The Fragility of Law: Constitutional Patriotism and the Jews of Belgium, 1940-1945* (Routledge, 2009), winner of the Hart Socio-Legal Book Prize, 2010, awarded for the most outstanding piece of socio-legal scholarship; *Law After Auschwitz: Towards A Jurisprudence of the Holocaust* (Carolina Academic Press, 2005); and *The Jews of the Channel Islands and the Rule of Law, 1940-1945* (Sussex Academic Press, 2000).

**Sam Garkawe**

Sam Garkawe is an Associate Professor at the School of Law and Justice at Southern Cross University in New South Wales, Australia. He has two Masters of Laws degrees from London University and Sydney University, and is admitted to the State Bar of California. Sam has published widely in the field of victimology, including issues concerning the role of victims in international justice mechanisms, such as the International Criminal Court and the South African Truth and Reconciliation Commission, and more recently on the need for a binding International Convention in support of victims. His published work includes a chapter entitled "The role and rights of victims at the Nuremberg International Military Tribunal" in the book *The Nuremburg Trials: international criminal law since 1945: 60th anniversary*

*international conference*. He presently teaches victimology, human rights, criminal law and procedure, and international criminal law. In July 2003 he was appointed to the United Nations Liaison Committee of World Society of Victimology (WSV), and in this capacity he has represented the WSV at United Nations Crime Congresses in Bangkok, Thailand (2005) and Salvador, Brazil (2010). Sam is a life member of the WSV and in 2009 was elected to its Executive Committee.

**Stanley A. Goldman**

Professor Goldman is Professor of Law and Director of the Center for the Study of Law and Genocide at Loyola Law School. There his courses have included Law and Genocide, Criminal Law, Evidence and Criminal Procedure, and Legal Ethics. Prior to becoming a full-time professor at Loyola he spent approximately eight years in the office of the Los Angeles County Public Defender. From 1996-2006, he was Legal Editor and then Legal Affairs Editor for Fox News Channel. Professor Goldman has appeared as a legal analyst for numerous media outlets including CBS National Network Radio and CNN.

**Gregory S. Gordon**

Professor Gordon is the Director of the University of North Dakota Center for Human Rights and Genocide Studies and teaches human rights and international and criminal law at the University of North

Dakota School of Law. Before joining the legal academy, he was a Senior Trial Attorney for the U.S. Department of Justice's Office of Special Investigations. He previously worked with the Office of the Prosecutor for the International Criminal Tribunal for Rwanda, where he served as Legal Officer and Deputy Team Leader for the landmark media cases, the first international post-Nuremberg prosecutions of radio and print media executives for incitement to genocide. His scholarship has been published in leading international publications and focuses on both the substantive and procedural aspects of human rights and international criminal law.

**Michael J. Kelly**

Professor Kelly is Professor of Law and Associate Dean for International Programs and Faculty Research at Creighton University School of Law. He has served as chair of the Association of American Law Schools (AALS) Section on National Security Law and is president of the U.S. National Chapter of L'Association International du Droit Pénal, a Paris-based society of international criminal law scholars, judges, and attorneys founded in 1924 that enjoys consultative status with the United Nations. His research and teaching focuses on the fields of international and comparative law and Native American law. He is the author and co-author of four books and over thirty articles and book chapters in these areas. He has taught International Criminal Law for over a decade.

**Matthew Lippman**

Professor Lippman is Professor of Criminology, Law, and Justice at the University of Illinois at Chicago, where he is a Master Teacher in the College of Liberal Arts and Sciences. He is also an Adjunct Professor of Law at John Marshall Law School in Chicago. Professor Lippman is a leading expert on the law of genocide and has written extensively on the Nuremberg trial and on other post-World War II prosecutions of Nazi war criminals. He teaches courses on international criminal law and genocide and the Holocaust. His most recent work centers on the legal profession in Nazi Germany, the extradition of Nazi war criminals, and on the Genocide Convention. He recently completed a series of ten articles which review the post-World War II trials of German industrialists, lawyers, doctors, concentration camp officials, diplomats, and military leaders. Dr. Lippman is also one of the leading legal writers on genocide and the 1948 Convention On The Punishment And Prevention Of The Crime Of Genocide. He has been cited or excerpted in leading international law texts and in various texts on criminal procedure as well as by the International Court of Justice and other international tribunals.

**Michael Marrus**

Professor Marrus is the Chancellor Rose and Ray Wolfe Professor Emeritus of Holocaust Studies and a Fellow of Massey College. A Fellow of the Royal

Society of Canada and a member of the Order of Canada, he received an M.A. and Ph.D. from the University of California at Berkeley – and more recently, a Master of Studies in Law at the University of Toronto. He has been a visiting fellow of St. Antony's College, Oxford; the Institute for Advanced Studies of the Hebrew University of Jerusalem; and has taught as a visiting professor at University of California, Los Angeles and the University of Cape Town, South Africa. His recent teaching, both in Law and History, focuses on political trials. He is the author of several books, including *Vichy France and the Jews* (with Robert Paxton) (Basic Books, 1981); *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press, 1985); *The Holocaust in History* (New American Library, 1989); and *The Nuremberg War Crimes Trial, 1945-46* (Bedford Books, 1997). He has recently published a book on the Holocaust-era restitution campaign of the 1990s, entitled *Some Measure of Justice* (University of Wisconsin Press, 2009).

**Fionnuala D. Ní Aoláin**

Professor Ní Aoláin is concurrently the Dorsey & Whitney Chair in Law at the University of Minnesota Law School and a Professor of Law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. In 2008, she was invited to participate as an expert in an Expert Seminar organized by the Working Group "Protecting human rights while

countering terrorism" of the United Nations Counter-Terrorism Implementation Task Force. She has previously been Visiting Scholar at Harvard Law School (1993-94); Visiting Professor at the School of International and Public Affairs, Columbia University (1996-2000); Associate Professor of Law at the Hebrew University in Jerusalem, Israel (1997-99); and Visiting Fellow at Princeton University (2001-02). Her most recent book, *Law in Times of Crisis* (Cambridge University Press, 2006), was awarded the American Society of International Law's preeminent prize in 2007: the Certificate of Merit for creative scholarship. She is also the author of "Sex-Based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law," 12 *Yale J.L. & Feminism* 43 (2000). She was a representative of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia at domestic war crimes trials in Bosnia (1996-97). In 2003, she was appointed by the Secretary-General of the United Nations as Special Expert on promoting gender equality in times of conflict and peace-making. She has been nominated twice by the Irish government to the European Court of Human Rights, in 2004 and 2007, the first woman and the first academic lawyer to be thus nominated. She was appointed by the Irish Minister of Justice to the Irish Human Rights Commission in 2000 and served until 2005.